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To be Argued by

CHARLES J. MCROBBIE
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 15.

FLEISHER ENGINEERING & CONSTRUCTION
CO. and JOSEPH A. BASS, doing business as
JOSEPH A. BASS CO., *et al.*,

*Appellants-Defendants in Court Below,
Petitioners,*

vs.

UNITED STATES OF AMERICA for the use and
benefit of GEORGE S. HALLENBECK, doing
business under the assumed name and style of
HALLENBECK INSPECTION AND TESTING
LABORATORY,

*Plaintiff-Appellee in Court Below,
Respondent.*

BRIEF ON BEHALF OF RESPONDENT IN CER-
TIORARI GRANTED ON REHEARING APRIL
22, 1940 (309 U. S. VII. 84 L. E. 738) TO REVIEW
DECISION OF UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIR-
CUIT. (R. 73.)

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LABORATORY,

*Plaintiff-Appellee in Court Below,
Respondent.*

BRIEF ON BEHALF OF RESPONDENT IN CERTIORARI GRANTED ON REHEARING APRIL 22, 1940 (309 U. S. VII. 84 L. E. 738) TO REVIEW DECISION OF UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT. (R. 73.)

Opinions Delivered in Courts Below.

1. Opinion of Hon. Augustus N. Hand in United States Circuit Court of Appeals, concurred in

by Learned Hand and Swan, J. J. (R. 65-71). Published, 107F (2nd) 925.

2. Opinion of Hon. John Knight, D. J. in trial court. (R. 34), Published 30 F. Supp. 964.
3. Opinion of Hon. John Knight, rendered in U. S. District Court, Western District of New York, in companion case (R. 35-40), 30 F. Supp. 961.

Statement of the Case.

The statement of the case contained in the Brief of the petitioner is correct but respondent deems it necessary to add thereto the following statements:

1. The judgment to be reviewed herein is in the sum of \$1130.53 with interest and costs. (R. 165.)
2. The Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., were joint contractors (R. 117) under a contract with the United States government for the construction of the Kenfield Housing Project at Buffalo, N. Y., and had one office devoted to the work involved in the carrying out of the performance of their contract. The notice sent by the respondent was contained in an envelope addressed to the Fleisher Engineering & Construction Co. at the said office on the site of the construction project. (R. 130.)
3. The notice was actually received by the said Fleisher Engineering & Construction Co. within the time limit specified in the Miller Act. (R. 113.)

Abstract.

Respondent agrees with the petitioner that the only question presented here is a question of law.

The only question for consideration is whether, in view of the provisions of section 270b, subdivision (a) of the Miller Act, George S. Hallenbeck gave sufficient notice to the contractors, Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., to enable him to bring suit on the payment bond furnished by the defendants' surety companies.

That presents a question of law only.

The Miller Act, so far as pertinent, reads as follows:

"Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect to which a payment bond is furnished * * * and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or balance thereof, unpaid at the time of institution of such suit and to prosecute such action to final execution and judgment for the sum or sums justly due him; provided, however, that any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the

last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done and performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office, or conducts his business, or his residence, or in any manner in which the United States Marshal of the District in which the public improvement is situated is authorized by law to serve summons."

Act of August 24, 1935, Chapter 642, sec. 2,
49 Stat. 794; 40 U. S. C. A. 270b.

This so-called Miller Act is the successor to the Heard Act, so-called. The Heard Act, so far as pertinent, reads as follows:

"Sec. 270. BONDS OF CONTRACTORS FOR PUBLIC BUILDINGS OR WORKS: RIGHTS OF PERSONS FURNISHING LABOR AND MATERIALS. Any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the

United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. * * * If no suit should be brought by the United States within six months from the completion and final settlement of said contract then the person or persons supplying the contractor with labor and materials shall, * * * be, and are hereby, authorized to bring suit in the name of the United States in the district court of the United States in the district in which said contract was to be performed and executed * * * for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: Provided, That where suit is instituted by any of such creditors on the bond of the contractor, it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later: And provided further, That where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. * * * Provided, Further, that in all suits instituted under the provisions of this section such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the State or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor."

Act of February 24, 1905, Chapter 778 as amended by the Act of March 3, 1911, Chapter 231, Sec. 291, 40 U. S. C. A. 270.

The appellants have not raised any question as to the notice containing the information required by the Miller Act. They do, however, raise a question that the notice was addressed to the government project engineer and not to the contractor. They concede, however, that a copy of this notice was served on the general contractor, Fleisher Engineering & Construction Co. by mailing the same in regular mail, postage prepaid, in an envelope addressed to the contractor at the place that the said Fleisher Engineering & Construction Co. and its co-contractor Joseph A. Bass, doing business as Joseph A. Bass Co., maintained their office for the purpose of handling the transactions in connection with the performance of the said contract with the government and was *actually* received by the said contractor, Fleisher Engineering & Construction Co. It is, therefore, the contention of the respondent that he gave sufficient notice to the contractors to enable him to bring suit on the payment bond.

BRIEF OF ARGUMENT.

POINT I.

Before we proceed with our argument, we wish to call the Court's attention to the reasons we believe existed for the enactment of the Miller Act.

Under the Heard Act, a claimant, such as the respondent herein, could not bring an action under the bond provided in the Heard Act until at least six months after the completion of the entire contract by the general contractors. We assume that the Court will recognize the fact that some projects were of such

magnitude that years would be required for their completion. Consequently, situations would arise where someone who had either performed labor, or furnished material, or both, at the very start of the project, would be unable to collect his just payments for this labor and/or material until a long, long time after the performance of his work or the furnishing of his material. It could well be that this delay in payment would be the deciding factor that would cause the claimant to be obliged to give up his business.

It is, therefore, assumed that Congress—having in mind that everyone who furnished material and/or labor on a governmental project should be paid in full—decided to enact legislation that would make it possible for the claimant to recover the amount due in a more expeditious fashion.

It is also assumed that Congress believed that it would be only fair that the general contractor should receive notice of the existence of an unpaid obligation from one or more of his sub-contractors within a reasonable time after the bill was due and owing so that he, in turn, could protect himself if he wished by withholding said sums from any moneys that might be due the debtor-contractor.

It is submitted that Congress never intended to take away from the materialman or laborer any of the benefits existing under the Heard Act without also enacting at least all of those benefits into new legislation, and additional benefits for the said materialman and laborer.

POINT II.

Every statute must be analyzed and its express meaning ascertained.

It is impossible to determine whether a statute has more than one meaning, or any meaning at all, without reading the language and seeking to understand. Then, and only then, is it possible to discover the meaning of the statute and to determine whether the statute is ambiguous and in accord with the general rule, subject to construction. But when the meaning of a statute has been ascertained, is it not logical to state that interpretation already has been accomplished? This rule was enunciated by the late Judge Cardozo when he was Chief Judge of the Court of Appeals of the State of New York, in the case of

Surace et al. v. Danna, et al., 248 N. Y. 18
wherein he stated:

“* * * Few words are so plain that the context or the occasion is without capacity to enlarge or narrow their extension. The thought behind the phrase proclaims itself misread when the outcome of the reading is injustice or absurdity. *Smith vs. People*, 47 N. Y. 330, 341, 342; Matter of *Meyer*, 209 N. Y. 386, 389, 103 N. E. 713, 714, L. R. A. 1915C, 615, Ann. Cas. 1915A, 263. * * *”

In this connection, these comments by Dwarris in his treatise

Dwarris (Potter)—Statutes 49, 50
are particularly pertinent and enlightening:

“All new laws, though penned with the greatest of technical skill and passed upon the fullest and most mature deliberation, are considered as more or less obscure and equivocal until their mean-

ing be fixed and ascertained by a series of particular discussions and adjudications. Besides the obscurity arising from the complexity of the objects and the imperfections of human faculties, the medium through which the conceptions of men are conveyed to each other adds a fresh embarrassment; the use of words is to express ideas. Perspicuity, therefore, requires not only that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriated to them. But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many, equivocally denoting different ideas * * *. And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined."

"No human wisdom can prepare a law in such a form, and in such simplicity of language as that it shall meet every possible complex case that may afterward arise. Whatever skill and forethought the most profound of human law-maker may have called to his aid, it will be found that even such law-giver, though he possess the highest of intellectual gifts will not possess grasp of mind enough to draw up * * * an enactment so perfect at the time it is drawn, that no doubtful case shall not afterwards arise as to its meaning. And as time wears on, and the wants and habits of society become changed, as they ever will change with the progressive march of intelligence * * * the interpretations, suitable to a past age, will become more and more impracticable to the present, as to all new questions."

As was stated in

U. S. v. Beaver Run Co., 99 Fed. (2) 610, 613:

"It is a well established doctrine that a clear, unambiguous statute must be literally construed. If an apparently unambiguous statute contains hidden ambiguities, or if a literal construction would clearly defeat the object intended by con-

gress, or if a literal construction would result in absurdities so gross 'as to shock the general moral sense.' then the courts may be entitled to depart from the strict wording in order to give the statute a reasonable construction."

Other cases apparently go so far as to actually construe statutes which are plain and unambiguous:

"It is said that when the meaning of language is plain, we are not to resort to evidence to raise doubts. That is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists. If Congress has been accustomed to use a certain phrase with a more limited meaning than might be attributed to it by common practice, it would be arbitrary to refuse to consider that fact when we come to interpret a statute."

Boston Sand & Gravel Co. vs. United States,

278, U. S. 41, 73 L. Ed. 170, 49 S. Ct. 52, aff.

19 Fed. (2) 744, which modified 7 Fed. (2)

278 and 16 Fed. (2) 643, aff. 23 Fed. (2)

839. The above quotation is from the op-

inion of Mr. Justice Holmes.

"The act of June 30, 1879, 21 Stat. 43, providing for the selection of jurors, grand and petit, in the courts of the United States, made a great change in the law then in force. While the language of the act is clear and free from ambiguity, and for this reason there is nothing to construe, still, to carry out the true meaning and intent of the Congress which enacted it and to understand what that intent was, it is proper to ascertain the mischief supposed to prevail at that time, and which it was sought to remedy by the enactment of that statute."

United States vs. Lewis, 192 Fed. 639.

"Unambiguous words call for no construction, but when unambiguous words are used in such a manner as to produce ambiguous or uncertain results, or to produce a manifest injustice or ab-

surdity, not within the reasonable contemplation of the legislature, then it is the duty of the court, in applying the law, to give it such application as is reasonable within the intent of the law."

Tillinghast vs. Tillinghast, 25 Fed. (2) 531, 533.

Also see *State vs. Thompson* (Mo.), 5 S. W. (2) 57.

As was stated in—

Commonwealth vs. Barney (115 Ky. 475, 74 S. W. 181).

"Even as read in entire harmony with its title, the terms of this statute are very general, and, if liberally construed and literally applied, would be most comprehensive and far-reaching. At first reading this statute may appear plain enough. But it must be studied, because practically it must be applied in connection with other statutes of this state. All criminal laws are necessarily enacted to remedy some evil existing or anticipated. Such was the situation which the legislature had in mind, that it must be deemed to have taken a comprehensive survey not alone of the hurtful thing to be corrected, but of the laws already in force tending to, but which had not fully served that end. The fraudulent conversion or disposal of the property of another without his consent goes over a wide range of criminal and civil law."

POINT III.

The Miller Act is remedial in its nature and should receive a liberal construction.

As was said by *Crawford* in his work on "Statutory Construction and Interpretation of Laws", at Page 494:

"To understand the reason for giving remedial statutes a liberal construction, it is necessary that we know what statutes fall within this category. For our discussion here, it will be sufficient to define a remedial statute as one which remedies a defect in the common law or in the pre-existing body of statute law. Such statutes play an important part in the jurisprudence of an advancing society. They supply the defects and abridge the superfluities in pre-existing law, which arise from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of judges, and from any other cause. They serve to keep our system of jurisprudence up-to-date and in harmony with new ideas or conceptions of what constitute justice and proper human conduct. Their legitimate purpose is to advance human rights and relationships. Unless they do this, they are not entitled to be known as remedial legislation nor to be liberally construed. Manifestly, a construction which promotes improvement in the administration of justice and the eradication of defects in our system of jurisprudence, should be favored over one which perpetuates wrong. It seems proper to assume that the lawmakers intended to advance our laws forward as far as our conceptions of justice and proper conduct extend. For this reason, if no other, remedial legislation is entitled to a liberal construction."

"Remedial statutes,
Colorado Milling, etc., Co., vs. Mitchell, 26
 Colo. 284, 58 Pac. 28 (employer's liability
 act);

Harrison vs. Monmouth Nat. Bank, 207 Ill.
 630, 69 N. E. 871 (action on negotiable in-
 struments):

that is, those which supply defects, and abridge
 superfluities, in the former law—

1 Blackstone, Comm. 86,

Also note

Barkley vs. Conklin (Tex.) 101 S. W. (2) 405.

Falls vs. Key (Tex.) 278, S. W. 893.

should be given a liberal construction

Lockhart vs. Hoffman, 197 N. Y. 331, 90 N. E. 943;

State vs. Baldwin, 62 Minn. 518, 65 N. W. 80
in order to effectuate the purpose of the legislature,

Tompkins vs. Hunter, 149 N. Y. 117, 43 N. E. 532;

Shea vs. Peters, 230 Mass. 197, 119 N. E. 746;
or to advance the remedy intended,

State vs. Lipkin, 169 N. C. 265, 84 S. E. 340;

Wright vs. Barber, 270 Pa. 186, 113 Atl. 200;
or to accomplish the object sought,

Amos vs. Conkling, 99 Fla. 206, 126 So. 283;
Inabinet vs. Royal Exchange Assur. Co. (S. C.) 162 S. E. 599;

and all matters fairly within the scope of such a statute should be included, even though outside the letter, if within its spirit or reason.

Traudt vs. Hagerman, 27 Ind. Ap. 150, 60 N. E. 1011;

Harbeck vs. Pupin, 123 N. Y. 115, 25 N. E. 311."

POINT IV.

Under a liberal construction, judgment should be affirmed.

Counsel for the appellants has cited numerous cases but it is submitted that a reading of same does not reveal any that should cause this Court to reverse

the judgment in favor of this respondent. It would seem that the cases cited all refer to statutes or ordinances where the right to a cause of action is *specifically* and *expressly* conditioned upon the performance of some particular act or acts on the part of those seeking to maintain an action under the various statutes.

The cases cited would be in point if the Miller Act had provided that a materialman or laborer would have a right of action upon giving written notice to the contractor, either by registered mail or by service of same by a United States Marshal of the district, or, if the Miller Act had specifically stated that no right of action would exist until a notice, given in either of the last two mentioned manners, had actually been served. It is submitted that the Miller Act does not contain any of the requirements or limitations suggested by the appellants herein.

Congress has provided that the respondent had a cause of action upon giving written notice. Congress did not provide any penalty in the event that the notice was given in some other manner than by registered mail, or by service by a United States Marshal and Congress did not provide that said cause of action would not come into existence if service by registered mail, or by a United States Marshal was not made.

It is very evident, as stated by Justice Hand, in his Opinion of Affirmance of the judgment (page 69 of the Record), that the object of requiring notice to the principal contractor was to enable him to withhold payments from a sub-contractor until the latter should

pay his own men who had worked on the job, and that when, as here, receipt of a written notice is conceded, the mode of transmission becomes unimportant and the provision as to mode of delivery should be regarded as directory and not mandatory.

That construction should be accepted which will make the statute effective and productive of the most good, as it is presumed that these results were intended by the legislature.

Duke Power Co. vs. South Carolina Tax.

Comm. (C. C. A.—S. C.) 81 Fed. (2) 513;

State vs. Canadian Pac. R. Co., 100 Me. 202,
60 Atl. 901;

In order to carry out the legislative intent, it is, therefore, apparent that the statute should be given a rational, logical and sensible interpretation.

Baxter vs. McGee (C. C. A.—Ark.) 82 Fed. (2)
695;

People ex rel. Wood vs. Lacombe, 99 N. Y.
43, 1 N. E. 599.

Any construction should be avoided, if possible, as contrary to the intent of the law-makers, that produces any effect at a variance with the commonly recognized concepts of what is right, just and ethical.

*International Railway Company vs. United
States*, 238 Fed. 317, 321

reveals the applicability of the principle herein discussed:

“There are fewer surer tests in statutory construction than to observe whether the interpretation contended for exposes the statute itself to ridicule; and to find in this act a requirement that all the numerous trolleys daily operating singly from one village to another, and crossing state lines in so doing, must carry useless automatic

couplers, is absurdity itself, and the argument must go to this extent."

In other words, if the language of the statute, construed as a whole and with due regard to its nature and object, reveals that the legislature intended the words "shall" and "must" to be directory, they should be given that meaning.

U. S. vs. Boyd, 24 Fed. 692;
Manufacturers' Exhibition Building Co. vs. Landay, 219 Ill. 168, 76 N. E. 146;
Pleasant Grove Union School Dist. vs. Algeo, 61 Calif. Ap. 660, 215 Pac. 726;
People vs. Bailey, 171 N. Y. S. 394, 103 Misc. 366.

Words which ordinarily are mandatory in their nature, will be construed as directory or vice versa, if for any reason it appears that it was not the intention of the legislature to make them mandatory.

Kansas Pac. R. Co. vs. Reynolds, 8 Kan. 623;
State vs. Talty, 166 Mo. 529, 66 S. W. 361;
Fields vs. U. S., 27 App. D. C. 433;
Boyer vs. Onion, 108 Ill. Ap. 612.

The Court's attention is respectfully directed to the Opinion of Judge Hand, affixed to the Record, wherein, at pages 70 and 71, he states as follows:

"Appellants' contention that notice to Fleisher Engineering & Construction Co. alone, even though sufficient in respect to manner and form, did not bind Joseph A. Bass, a joint contractor, is clearly without merit. Notice to one of two (fol. 73) joint obligors or contractors has from ancient times been held to convey notice to the other in respect to matters affecting the joint adventure or obliga-

tion. Tevis v. Ryan, 233 U. S. 273, 287; Northern Ill. Coal Co. v. Cryder, 361 Ill. 274; Knight v. Field, 7 Cush. 263; Morse v. Aldrich, 1 Met. 544; Terry & Lowe v. Reding, Moore 555."

The appellants have raised numerous questions of law of a highly technical character, none of them in the least affecting the merits of the controversy. We repeat that the notice did comply with the statute as to its contents. Although it did contain the name of the project engineer as a heading, it also bore the name of the contractor, Fleisher Engineering & Construction Co. on the bottom and this certainly was, under these circumstances, notice, within the proper interpretation of the Miller Act, to the general contractor. There is no requirement in the statute that a demand should be made upon the contractor. All he was entitled to receive was written notice of an outstanding unpaid claim.

Judge Knight, in his Opinion (R. 36) was correct when he referred to the letter as being directed to the Fleisher Engineering & Construction Co., because the placing of the words "CC: Fleisher Engr. & Constr. Co." is a direction of that letter to them and they *actually* received it. A reading of the letter shows that it was the position of the respondent that the defendant, Maryland Casualty Company had knowledge of the unpaid account and had even taken it up with the home office. (R. 153.)

We find ourselves squarely within the position taken by this Court in the case of—

Illinois Surety Co. v. Jno. Davis Co., 244 U. S. 376, 380, 37 Sup. Ct. 614, 616 (61 L. Ed. 1206)

at which time the Court stated:

‘The statute in question and the proceedings under it are such as to offer great opportunity for such **objections**, which, if favorably regarded, might often be invoked to defeat substantial justice. In order to prevent this, the Supreme Court has recognized the necessity of a broad and liberal construction of the Act.

Decisions of this Court have made it clear that the statute and bonds given under it, must be construed liberally, in order to effectuate the purpose of Congress as declared in the Act. In every case which has come before this court, where labor and materials were actually furnished for and used in part performance of the work contemplated in the bond, recovery was allowed, if the suit was brought within the period prescribed by the Act. Technical rules otherwise protecting sureties from liability have never been applied in proceedings under this statute.

And, as was cited in the matter of—

United States vs. James Mills & Sons Co.,
55 Fed. 2d Series 249

‘The auditor found that no notice was given, nor publication made as required by the statute. The defendants contend that, as the statute has not been complied with, there can be no recovery. The argument as to the lack of publication would be a compelling one were it not for the case of United States v. N. Y. Steam Fitting Company, 235 U. S. 327, 35 S. Ct. 108, 59 L. Ed. 253, where the Supreme Court, exercising its fatherly care over badly drawn acts of congress, has decided that the provision for publication is merely directory, *Fleischmann v. United States, supra*.’

It is respectfully submitted that the decision of the United States Circuit Court of Appeals for the Sixth Circuit in the matter of the United States of America for the use and benefit of John A. Denie's Sons Co. vs. Joseph A. Bass, *et al.*, is not contrary to and in con-

flict with the decision of the United States Circuit Court of Appeals for the Second Circuit in this case now being presented to the Court.

It was the opinion of the Circuit Court of Appeals for the Second Circuit that a person in Hallenbeck's situation had a cause of action upon giving written notice to the contractor. In the John A. Denie's Sons Co.'s case, the question that was presented was whether actual notice was sufficient to eliminate the requirement for written notice. It is the contention of the respondent here that the Circuit Court for the Second Circuit has not passed on the same question that was before the court in the Denie's Sons Co.'s case.

POINT V.

The judgments of the Circuit Court of Appeals and of the District Court should be affirmed with costs.

Respectfully submitted,

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